Securities Commissions Provide Guidance on New Take-–Over Bid Regime

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In *Aurora Cannabis Inc. (Re)*, 2018 ONSEC 10, the Ontario Securities Commission and the Saskatchewan Financial and Consumer Affairs Authority (the “Commissions”) recently, and for the first time, provided guidance on the conduct of hostile take-over bids under the new Canadian regulatory regime, which came into force in early 2016. The Commissions held that, in essence, the take-over bid regime is a nearly complete code. Notably, the Commissions held that: tactical shareholder rights plans will rarely be allowed; the minimum bid period will seldom be abridged beyond the enumerated exceptions; and, the bidder’s ability to purchase up to 5 per cent of shares of the target on the open market will rarely be negated.

Background

In November 2017, Aurora Cannabis Inc. (“Aurora”) launched a hostile take-over bid for all of the issued and outstanding common shares of CanniMed Therapeutics Inc. (“CanniMed”). In the months prior to the bid, CanniMed had been in exclusive negotiations with Newstrike Resources Ltd. (“Newstrike”) related to a potential acquisition of Newstrike by CanniMed. Two nominee directors on the CanniMed board of directors ("CanniMed Board") and one of CanniMed’s large institutional shareholders, Vantage Asset Management (“Vantage”), opposed the Newstrike transaction and insisted that CanniMed would be better to pursue a strategic sale process.

Unhappy with CanniMed’s pursuit of the Newstrike transaction which was nearing an agreement between the parties, and unbeknownst to the CanniMed Board, Vantage approached Aurora to suggest it pursue a business combination with CanniMed. Aurora subsequently entered into “hard” lock-up agreements with Vantage and other CanniMed shareholders representing approximately 38 per cent of CanniMed’s then issued and outstanding shares. Just days before CanniMed announced it had entered into a binding agreement with Newstrike, Aurora submitted a non-binding proposal to acquire CanniMed. After further deliberations, the CanniMed Board determined to proceed with the transaction with Newstrike and on November 17, 2017, entered into a binding agreement that provided for the purchase of all of Newstrike’s common shares by CanniMed pursuant to a plan of arrangement. On November 24, 2017, Aurora commenced its hostile bid with one of the conditions being the termination of the Newstrike arrangement agreement.

In response to the bid, and on the recommendation of a special committee of independent directors of the CanniMed Board (the “Special Committee”), CanniMed adopted a shareholder rights plan (the “Plan”). The Plan precluded Aurora from acquiring any CanniMed shares (at the time it did not own any) or from entering into any additional lock-up agreements in respect of the bid.

In November and December 2017, Aurora, CanniMed, and the Special Committee all brought applications to the Commissions, and the applications were heard on an urgent basis.

On December 22, 2017, following a simultaneous hearing with the FCAA (Saskatchewan) and the OSC, the Commissions issued orders (1) denying Aurora’s application to shorten the 105-day minimum deposit period; (2) denying CanniMed’s cross-application to prohibit Aurora from acquiring 5 per cent of CanniMed common shares; (3) finding there was insufficient evidence to establish the locked-up shareholders were acting jointly or in concert with Aurora; (4) requiring Aurora to issue amended new releases and an amended take-over bid circular to disclose certain information that could reasonably affect CanniMed shareholders’ decision to accept or reject the offer; and (5) cease trading the Plan.

Key Points in Commissions' Guidance

The Commissions took this opportunity to make clear that the amendments to the take-over bid regime that were made in 2016 are largely meant to ensure predictability of the regime.

Alternative Transaction Determination

With respect to Aurora’s application to shorten the minimum deposit period, the Commissions found the policy rationale for the “alternative transaction exception” did not exist in this case. Aurora’s decision to include, as a condition of its bid, that the Newstrike transaction not be completed could not transform the Newstrike transaction into an "alternative transaction." Interestingly, however, by indicating that the developed strategic rationale and the history and timing of the Newstrike transaction “convinced [the Commissions] that the acquisition was not intended as a defensive tactic” against the bid, the Commissions’ statement could possibly be interpreted as suggesting that if the Newstrike transaction was found to be an impermissible defensive tactic, it may have been characterized as an alternative transaction for the purposes of the exception.

Shareholder Rights Plan

Further, the Commissions made clear that, except in rare circumstances, tactical shareholder rights plans will not be permitted. The Commissions stated that a plan that simply reiterates the requirements of the current take-over bid regime would serve no purpose and potentially confuse investors whereas given the protections of the new take-over bid regime, there rarely would be a need to provide for any further protections. The Commissions found that the rebalancing of the take-over bid regime by mandating the 105-day deposit period, the minimum 50 per cent tender condition and the mandatory 10-day extension following satisfaction of conditions, provided sufficient protections in this case, and likely in most cases, to facilitate shareholder choice.

Moreover, the Commissions found that the Plan "could not primarily be said to be giving the Board time to conduct an auction to allow time for higher bids to emerge." It appears that only in rare and unique circumstances will the Commissions permit a target of a hostile bid to keep a tactical rights plan in place.

Lock-Up Agreements and Joint Actors

Finally, despite the Commissions' finding of fact that Aurora's bid was commenced based on material non-public information ("MNPI") from Vantage, the Commissions concluded there was insufficient evidence for a finding that the locked-up shareholder were acting jointly or in concert with Aurora. Relying in part on the language in the regulation (subsection 1.9(3) of NI 62-104), the Commissions clarified that lock-up agreements are acceptable business tools and not necessarily indicative of joint actor status. The Commissions noted that the presumption that an agreement to exercise voting rights leads to a joint actor status can be rebutted, where the voting rights are tailored to be consistent with and to support otherwise permissible commitments to tender a party's securities to the bid. Further, despite ordering Aurora to amend its news releases and takeover bid circular, the Commissions found that once CanniMed announced that it had entered into the Newstrike arrangement agreement, the receipt of the MNPI was, for Aurora, cleansed by such disclosure. These findings signal that the Commissions will likely be reluctant to make a finding of joint actor status without clear and substantive evidence of coordination, such as economic sharing or transferring voting rights or entitlements.

BLG Team

BLG represented CanniMed in all aspects of the transactions with Newstrike and Aurora, including at the hearings before the Commissions.

The BLG securities team was led by Philippe Tardif with support from Jason Saltzman, Andrew Powers, Mark Wheeler, Colin Cameron-Vendrig, Rocky Swanson, and Joseph DiPonio.

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